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No. 94-1849

In The

Supreme Court of the United States

October Term, 1994

CECELIA N. EAGLESTON,

Petitioner,

vs.

DANIEL GUIDO, BRIAN K. BUGGE, Police Officer, DETECTIVE RIVERA, DENNIS DONNELLY, Police Officer, EDWARD KOPF, Police Officer, DANIEL MOORE, Police Officer, JACK OZER, Police Officer, DEWITT C. TREDER, JAMES ROONEY, Police Officer, MP MILWARD, Police Officer, MICHAEL PESALE, Police Officer, PAUL KERN, Police Officer, SUFFOLK COUNTY, SUFFOLK COUNTY POLICE DEPARTMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petitioner raised a question of substantial importance which would warrant the granting of a writ of certiorari?

2. Whether the circuits have been in accord regarding the treatment of equal protection claims arising from alleged discriminatory police department arrest policies in domestic violence cases?

3. Whether intent or motivation to discriminate regarding a facially neutral policy may be inferred from an alleged failure to cease the facially neutral policy?

4. Whether the petitioner had a legitimate entitlement to have her husband arrested for violation of her temporary and permanent orders of protection which would be subject to Fourteenth Amendment due process constraints?

5. Whether the Second Circuit Court of Appeals correctly affirmed the granting of qualified immunity to the police officer respondents upon finding that the officers' actions were objectively reasonable in light of legal rules that were clearly established at the time the action was taken?

6. Whether the Second Circuit Court of Appeals correctly found that the petitioner's claim accrued when she suffered compensable damages with respect to her equal protection claim?

LIST OF PARTIES

Petitioner Cecelia Eagleston is an individual.

Respondent Daniel Guido became the Suffolk County Police Commissioner two years following the occurrence of the events at issue;[1]

Respondents Brian K. Bugge, Dennis Donnelly, Edward Kopf, Daniel Moore, Jack Ozer, James Rooney, M.P. Milward, Michael Pesale and Paul Kern are Suffolk County Police Officers.

Detective Rivera is a Suffolk County Police Detective.[2]

Respondent Dewitt C. Treder was the Suffolk County Police Commissioner during the occurrence of the events at issue.

Respondent Suffolk County is a municipal corporation and a political subdivision of the State of New York.

Respondent Suffolk County Police Department is an agency of the County of Suffolk.

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1. Petitioner withdrew her cause of action against Commissioner Guido.

2. Petitioner withdrew her cause of action against Detective Rivera.

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Suffolk County, respectfully requests that this Court deny the Petition for a Writ of Certiorari submitted by petitioner, Cecelia N. Eagleston.

STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions cited by the petitioner, the following statutes are also involved:

New York State Criminal Procedure Law § 140.10

New York State Criminal Procedure Law § 10.00

New York State Penal Law § 240.25

New York State Family Court Act § 812

(Excerpts are reproduced in Respondents' Appendix.)

STATEMENT OF THE CASE

On December 5, 1989, the petitioner commenced this 42 U.S.C. §1983 suit against Suffolk County, the Suffolk County Police Commissioner, DeWitt Treder, and ten police officers alleging that her constitutional right to equal protection was violated by the police department's "practice of affording inadequate protection, or no protection at all, to women who have complained of having been abused by their husbands or others with whom they have a close relationship" (J.A.[3] 32). The respondents denied the allegations and asserted a qualified immunity defense (J.A. 36-41).

Petitioner's complaint sets forth several incidents of police involvement during a two-month period before she was stabbed by her husband. The complaint lists ten different police officers who responded to ten incidents.

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3. Denotes the Joint Appendix filed with the Second Circuit Court of Appeals.

Petitioner and her husband owned a one-family home (J.A. 1005, 1090) and rented an apartment in the basement to Mr. Eagleston's sister (J.A. 1006, 1114). On October 20, 1986, the petitioner served Mr. Eagleston with divorce papers. Later that day, petitioner called the police alleging that Mr. Eagleston was threatening her, was throwing objects at her and was putting holes in an unfinished basement wall which he had just erected. Thereafter, over a period of two months, the petitioner placed eleven more calls to the police department, all of which were responded to by the various police officer respondents. A majority of the calls involved incidents which were not crimes and, therefore, not arrestable offenses since they occurred outside of the police officers' presence (N.Y. Crim. Proc. Law, §140.10 (McKinney's 1992), p. 1a, *infra*).

The petitioner obtained a temporary order of protection after the October 20, 1986 incident, which ordered Mr. Eagleston to refrain from acts of violence towards the petitioner and her infant son. On November 10, 1986, Mr. Eagleston obtained an order of protection which ordered the petitioner to refrain from acts of violence and threats of physical violence against Mr. Eagleston. On November 26, 1986, petitioner obtained another order which, in addition to requiring Mr. Eagleston to refrain from acts of violence, also granted the petitioner "exclusive use and occupancy" of the marital home. While the matrimonial court had advised Mr. Eagleston orally that he was to stay away from petitioner's home, this was never set forth in the petitioner's order (J.A. 113).

Three of the calls placed by the petitioner to the police department involved allegations that Mr. Eagleston was at petitioner's home in violation of the order of protection. Officer Ozer, the only police officer who found Mr. Eagleston at the premises, did not arrest Mr. Eagleston because he was in the basement apartment which his sister rented from the parties.

On November 9, 1986, Officer Kern responded to the first incident where a party was injured. Petitioner called the police claiming that Mr. Eagleston kicked her and pulled her hair. She admitted that she did not receive any injuries (J.A. 1107-1108). Petitioner had in fact stabbed Mr. Eagleston, who was taken by ambulance to the hospital to have his wounds sutured. The next incident involving claims of violence occurred November 23, 1986. Both petitioner and Mr. Eagleston were arrested for violating each other's orders of protection. After spending the night in jail, both parties withdrew the charges against each other. On December 27, 1986, the petitioner was stabbed by her husband.

The Suffolk County Police Department made no distinction in the treatment of domestic incidents as opposed to non-domestic incidents. In 1984, the Suffolk County Legislature passed a resolution which directed the Police Commissioner to press criminal enforcement of family violence cases (Pet. App. 69a)[4]. Commissioner Treder, as a result of this resolution, issued Order 84-57 (Pet. App.71a) which reaffirmed the procedures to be utilized in handling domestic disputes and domestic violence. These procedures are in accordance with the authority to arrest set forth in the New York State Criminal Procedure Law (N.Y. Crim. Proc. Law §140.10, McKinney's 1992, p. 1a). A police officer cannot arrest a person for committing a violation outside his presence.

Commissioner Treder later issued order 85-20 regarding the treatment of orders of protection (Pet. App. 74a). This order provided that where there was probable cause that a respondent violated the terms of an order of protection, an arrest would be made. The petitioner or victim was required to sign a civilian arrest form in order to effectuate the arrest. It was not until 1988,

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4. References to Petitioner's Appendix are in the form "(Pet. App. ___)."

that Suffolk County amended its policy to require the arrest of persons who violated orders of protection, regardless of the victims' wishes.

As the result of a summary judgment motion made by the defendants, the claims against Officers Bugge, Kopf, and Kern and Donnelly were dismissed upon statute of limitations grounds. The claims against Officers Ozer and Moore were dismissed upon qualified immunity grounds. The claim against Officer Rooney was dismissed due to petitioner's failure to state a claim upon which relief can be granted (Pet. App. 31a). Petitioner withdrew the claims against Commissioner Guido and Detective Rivera.

During the first jury trial, at the close of petitioner's case, Judge Leonard Wexler dismissed the claims against the remaining police officer defendants upon qualified immunity grounds. After three days of deliberation, the jury was deadlocked. No partial verdict was rendered in open court or on the record.

The second jury trial was held before Judge Nicholas Tsoucalas who was sitting by designation. After four days of deliberation, the second jury also was deadlocked. In response to the court's inquiry as to whether the jury had answered any of the questions on the verdict sheet, the jury advised the court that two questions were answered unanimously. The jury found that the plaintiff did not prove that Suffolk County had an unconstitutional policy which denied women equal protection of law, and further found that the plaintiff proved that Suffolk County had an unconstitutional policy which denied victims of domestic violence equal protection of the law.

Judge Tsoucalas declared a mistrial and then granted defendants' directed verdict motion and dismissed the case. The

court found that petitioner failed to introduce evidence that the County had a policy which deprived the petitioner of her constitutional rights (J.A. 1047).

The Court of Appeals, Second Circuit, affirmed the lower court's dismissal finding that "on the basis of the admitted evidence, the jury could not have concluded without conjecture that the County's policy deviated from its stated arrest policy of treating domestic violence the same as other acts of violence;" and that "even if the Progress Report is deemed to show that the County's practice deviated from its stated policy, that deviation is insufficient to create a jury issue in the absence of a showing that its purpose was invidious discrimination against women" (Pet. App. 22a).

SUMMARY OF ARGUMENT

This case does not present an issue appropriate for the exercise of this Court's discretionary jurisdiction. The District Court and the Second Circuit Court of Appeals found that the petitioner failed to prove her *prima facie* case. Petitioner is now submitting a general appeal of issues which have been fully addressed by the District Court and the Court of Appeals.

The decision by the Second Circuit Court of Appeals conforms with decisions by other circuits and by this Court. There is, therefore, no conflict among the circuits requiring resolution by this Court. Accordingly, there is no basis for reviewing the Second Circuit Court of Appeals decision.

REASONS FOR DENYING THE WRIT

I.

THE STANDARD USED TO DETERMINE WHETHER A FACIALLY GENDER-NEUTRAL POLICY VIOLATES THE EQUAL PROTECTION CLAUSE HAS BEEN CONSISTENTLY APPLIED BY THE UNITED STATES COURTS OF APPEALS.

This Court addressed an equal protection challenge to a gender-neutral statute in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) and enunciated the standard of review to be applied. Initially, it must be determined whether the statute is truly neutral. If the statute is not gender-based, then the court must determine whether the adverse impact reflects invidious gender-based discrimination. *Feeney, supra*, 442 U.S. at 274, 99 S. Ct. at 2293, 60 L. Ed. 2d at ___. This Court stated, in pertinent part:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 179, 97 S. Ct. 996, 1016, 51 L. Ed. 2d 229 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Feeney, supra, 442 U.S.at 279, 99 S. Ct. at 2296, 60 L. Ed. 2d at ___.

In an effort to invoke this Court's jurisdiction the petitioner attempts to create a conflict where none exists. The circuits which have rendered decisions concerning claims of discrimination against municipalities who fail to treat domestic abuse incidents in the same manner as they treat non-domestic abuse incidents have consistently applied the standards enunciated in *Washington v. Davis,* 426 U.S.229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) and *Feeney, supra.* The plaintiff must prove that the municipality has a policy or custom whereby the police provide less protection to victims of domestic violence than to victims of non-domestic violence, that discrimination against women was a motivating factor and that the plaintiff was injured by the policy or custom. *Eagleston v. Guido,* 41 F.3d 865, 878 (2d Cir. 1994); *Ricketts v. City of Columbia, Missouri,* 36 F.3d 775, 779 (8th Cir. 1994); *McKee v. City of Rockwall, Texas,* 877 F.2d 409, 416 (5th Cir. 1989); *Hynson v. City of Chester,* 864 F.2d 1026, 1031 (3d Cir. 1988); *Watson v. City of Kansas City,* 857 F.2d 690, 696 (10th Cir. 1988).

While the petitioner erroneously contends that *Watson, supra,* and *Balisteri v. Pacifica Police Department,* 901 F.2d 696 (9th Cir. 1990), indicate a disagreement between the circuits on the applicable equal protection standards, the respondents submit that those decisions are in accord with the decisions rendered by this Court and by other circuits.

In *Balistreri, supra,* the Ninth Circuit Court of Appeals reversed the lower court's dismissal of plaintiff's equal protection claim and remanded to the lower court with instructions to allow the plaintiff to amend her complaint. The Court of Appeals found that because the allegations contained within the complaint strongly suggested "an intention to treat domestic abuse cases less seriously than other assaults, as well as animus against abused women," leave to amend should have been granted. The court did not discuss the standard required to show

an equal protection violation, but merely focused upon the standards for granting leave to amend a complaint.

It is equally clear that the Tenth Circuit Court of Appeals decision in *Watson, supra,* does not conflict with the decisions of the other circuits. The court in *Watson,* citing *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 265, 97 S. Ct. 555, 563, 50 L. Ed. 2d 450 (1977) and *Washington v. Davis, supra,* found that the plaintiff in an equal protection action has the burden of demonstrating discriminatory intent or that a discriminatory purpose was a motivating factor. *Watson, supra,* 857 F.2d at 694. In fact, the Third Circuit Court of Appeals in *Hynson, supra,* utilized the *Watson* and *Balistreri* decisions as a guide to formulating its summary judgment standard stating:

> We agree with the *Watson* court that if the categories used by the police and domestic violence and non-domestic violence, this is not sufficient to raise a claim for gender-based discrimination absent a showing of an intent purpose or effect of discriminating against women. In order to survive summary judgment, a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and the plaintiff was injured by the policy or custom.

Hynson, supra, 864 F.2d at 1031.

The Second Circuit Court of Appeals correctly applied the

equal protection principles derived from *Washington, supra, Feeney, supra,* and its progeny, when it affirmed the dismissal of petitioner's complaint in this case.

II.

PETITIONER FAILED TO SHOW THAT SUFFOLK COUNTY HAD A POLICY OR PRACTICE WHICH DISCRIMINATED AGAINST VICTIMS OF DOMESTIC VIOLENCE.

The petitioner introduced the following evidence at trial in an effort to prove that the respondents had a discriminatory policy: a 1984 County resolution which authorized the police commissioner to press criminal enforcement in cases of family violence (Pet. App. 69a); Commissioner Treder's orders (Pet. App. 71a-92a); non-verbatim minutes of a Public Safety Committee Meeting of the County Legislature (Pet. App. 47a-66a); raw data compiled by the police department which listed domestic disputes; and the testimony of the petitioner.

The District Court and Second Circuit correctly found that the petitioner did not prove that the police department's arrest policy was discriminatory. The 1984 resolution and resultant orders issued by Commissioner Treder support the County's position that the Suffolk County Police did not discriminate.

The statistics cited by the petitioner (Petition, p. 9) were not introduced as evidence and are fundamentally flawed because, among other reasons, counsel for the petitioner calculated the arrest rates utilizing raw data which included non-arrestable offenses. The statistics concerning arrests after the incident, also not before the Court, reflect in part a change of policy which occurred two years after the occurrence of the incidents at issue.

Petitioner's testimony showed that many of the incidents involved violations which occurred outside the presence of the police officers. Other incidents involved Mr. Eagleston's lawful presence in an apartment which the petitioner and Mr. Eagleston rented to Mr. Eagleston's sister. Furthermore, the trial transcript is devoid of any sexist or demeaning remarks directed to petitioner by police officers. Officer Bugge could not arrest petitioner's husband for putting holes in a sheet rock wall of a house which he owned jointly with the petitioner. On November 7, 1986, when the petitioner went to the police precinct to lodge a complaint of harassment against her husband, Officer Kopf[5] could not arrest Mr. Eagleston because the violation occurred out of his presence. Officer Kopf testified that Mr. Eagleston did not appear at the precinct, while the petitioner testified that Mr. Eagleston appeared at the precinct and said "she is my wife and I will take her home." (J.A. 1020-1021).

On December 8, 1986, Officer Pesale responded to petitioner's call claiming that Mr. Eagleston attempted to run her down with his vehicle. Petitioner was not injured, there were no witnesses and Mr. Eagleston was not at the scene. Petitioner incorrectly states in her brief that Officer Pesale did not go into the house to investigate or search for her husband, even though she told him that he was probably in the house. Contrary to petitioner's false assertion, the petitioner testified that she did not tell Officer Pesale that her husband might be in the basement she told him that "he was in the car. He was on the road." (J.A. 509).

Petitioner did not introduce any evidence with regard to improper training. The only evidence on this issue was presented by police officers who testified that they received training on the

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5. Petitioner erroneously names Officer Kirk as the officer involved in the incident. Officer Kopf was in fact the officer involved, Officer Kirk responded to a call on November 23rd and arrested both parties for violating each other's orders of protection (Petition, p. 13).

mediation of disputes, and that the course included the mediation of both domestic and non-domestic disputes.

The Court of Appeals noted that even if it credited petitioner's interpretation of the Progress Report (Pet. App. 93a-117a), which was not in evidence before the trial court, the petitioner would have established "no more than that on the average a claim of domestic violence is less likely to result in an arrest than a claim of violence between strangers." (*Eagleston, supra,* 41 F.3d at 878). The Court of Appeals, citing *Feeney, supra,* further found that the petitioner failed to prove impermissible discriminatory intent. (*Eagleston,* 41 F.3d at 878).

Petitioner, like the appellee in *Feeney, supra,* contends that the respondents' alleged failure to cease the discriminatory practice is evidence of discriminatory intent. In *Feeney,* the appellee challenged a Massachusetts law which gave preference to veterans for civil service employment. The appellee argued that she had proven discriminatory intent based solely on evidence that the nature of the preference was demonstrably gender-biased, the impact of the preference was inevitable and the preference had no relationship to job performance. This Court rejected that argument and held that proof of discriminatory purpose requires more than intent as volition or intent as awareness of consequences. *Feeney, supra,* 442 U.S. at 281, 99 S. Ct. at 2297, 60 L. Ed. 2d 870. *See also, American Nurses Association v. State of Illinois,* 783 F.2d 716 (7th Cir. 1986) (court held that intentional discrimination cannot be inferred from the state's failure to eliminate wage disparities shown by a comparable worth report).

Accordingly, the respondent County's alleged failure to cease its gender-neutral policy does not give rise to the requisite showing of purposeful discrimination or discriminatory intent.

III.

PETITIONER FAILED TO SHOW A VIOLATION OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS.

The petitioner did not allege a due process violation in her complaint, nor did she introduce evidence which would support such a claim. Petitioner's brief to the Court of Appeals contained two sentences regarding this claim:

> Finally, a municipality may be liable where its officers deny a right to which a citizen is entitled (citation omitted). Statutes, rules or understandings, contracts, ordinances and policies of a city, or an order of protection, can all confer benefits which entitle the beneficiary to constitutional due process (citations omitted).

Petitioner further failed to advise the District Court or the Court of Appeals as to the nature of the claimed entitlement or the origin of the entitlement.

In *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 197, 109 S. Ct. 998, 1004, 103 L. Ed. 2d 249 (1989), this Court held that a "state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." This Court did not consider petitioner's "entitlement" claim in *DeShaney* because it was not argued in the lower courts or raised in the petition for certiorari. *DeShaney,* 489 U.S.at 195 n.2, 109 S. Ct. at 1003 n.2, 103 L. Ed. 2d at ___.

In order for the petitioner to succeed with her Fourteenth

Amendment procedural due process claim, she must have a legitimate claim of entitlement to a property right created by state law. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). It appears that petitioner claims that she was entitled to have her husband arrested for violating her orders of protection (Petition, p. 17) and that her claim of entitlement emanates from the 1984 County resolution (Pet. App. 69a) and Commissioner Treder's orders (Pet. App. 74a).

The resolution by the County legislature did not alter police arrest powers regarding violations of orders of protection. The sponsor of the resolution testified that the resolution was a policy statement and that it didn't change the state laws (J.A. 585). He further testified that the resolution did not alter the fact that the police officer makes the determination to arrest for a violation of an order of protection at the scene based upon probable cause (J.A. 591). Commissioner Treder's order specifically requires a determination of probable cause in order to arrest for violation of an order of protection.

Petitioner's temporary order of protection (p. 6a), which was granted *ex parte,* ordered petitioner's husband to refrain from acts of violence towards the petitioner or their son pending the return date of November 3, 1986. The state court, by order dated November 26, 1986, continued the temporary order requiring the petitioner's husband to refrain from acts of violence. The order also granted "exclusive use and occupancy of the marital residence" to the petitioner (p. 10a, *infra*).

Petitioner cites *Coffman v. Wilson Police Department,* 739 F. Supp. 257 (E.D. Pa. 1990) in support of her contention that an order of protection may confer an "entitlement" claim. The District Court found that orders of protection create a property interest in police enforcement cognizable under *Roth, supra.* The

property right was defined as "the right to reasonable police response." *Coffman, supra,* 739 F. Supp. at 265. *See also, Siddle v. City of Cambridge,* 761 F. Supp. 503 (S.D. Ohio 1991) (order of protection creates a property right incurring a duty upon government). Specifically, the court found that an order issued by a court and served upon a police department providing that the police department "shall" enforce the order creates a property right. *Coffman, supra,* 739 F. Supp. at 264. The *Coffman* decision contradicts the decision in *Hynson v. City of Chester,* 731 F. Supp. 1236 (E.D. Pa. 1990), a prior decision in the circuit, noting that there were no valid or prior decisions in its circuit which specifically held that an order of protection does not create a property interest. The *Hynson* court however, found that in view of the responding police officer's "broad discretion to formulate the appropriate response" to a violation of an order there could be no property interest. *Hynson, supra,* 731 F. Supp. at 1240.

Respondents respectfully submit that orders of protection which restrain the behavior of an individual do not give rise to a legitimate claim of entitlement to the arrest of the individual who allegedly violates the order. There is no automatic arrest, but merely an expectation that the respondent will behave in accordance with the order and, if not, that an arrest may be made. Unlike welfare benefits which are specifically defined *Goldberg v. Kelly,* 397 U.S. 254, 90 S. Ct. 1011, ___ L. Ed. 2d ___ (1970), the enforcement of an order of protection by arrest is dependent upon the responding police officer's judgment as to whether probable cause exists. *See Hynson, supra,* 731 F. Supp. at 1240.

No circuit court of appeals has determined that an order of protection is tantamount to a property interest. The Ninth Circuit rejected a similar due process claim in *Balistreri v. Pacifica Police Department,* 901 F.2d 696 (9th 1990). In *Archie v. City of Racine,* 847 F.2d 1211 (7th Cir. 1988), *cert. denied.* 489 U.S. 1065, 109 S. Ct. 1338, 103 L. Ed. 2d 809 (1989), the Seventh

Circuit affirmed the dismissal of plaintiff's due process claim against a dispatcher who refused to provide rescue service. The circuit court noted that procedural entitlements established by state law "are not themselves property and if a state erratically deprives a person of property, . . . the opportunity to obtain redress in state court *is* due process when a prior hearing is infeasible. . ." *Archie, supra,* 847 F.2d at 1217.

Assuming, *arguendo,* that the petitioner has established a property interest in her temporary order of protection and order of protection, she is entitled to no more than reasonable efforts to enforce the order. *Hynson, supra; Coffman, supra; Siddle, supra.* The trial court correctly dismissed the claims against each of the police officer respondents on qualified immunity grounds, after finding that their actions were objectively reasonable. This finding precludes petitioner's due process claim.

IV.

THE RESPONDENT POLICE OFFICERS WERE GRANTED QUALIFIED IMMUNITY BECAUSE THEIR ACTIONS WERE OBJECTIVELY REASONABLE IN LIGHT OF THE LEGAL RULES THAT WERE CLEARLY ESTABLISHED AT THE TIME.

The individual police officer respondents herein were granted qualified immunity because they demonstrated that it was objectively reasonable to believe that probable cause to arrest did not exist and/or that it was objectively reasonable to believe that they had no authority to arrest. The dismissal of the individual police officer respondents conforms to the standard set forth in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) and *Anderson v. Creighton,* 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

Additionally, this Court has acknowledged that police officers may, on occasion, incorrectly determine that probable cause to arrest is present, and the court has granted qualified immunity notwithstanding the lack of probable cause. *Malley v. Briggs,* 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). In *Anderson, supra,* this Court held that in cases where police officers mistakenly conclude that probable cause is present, the police officer should not be held personally liable if he acted in a way he reasonably believed to be lawful. 483 U.S. at 641, 107 S. Ct. at 3040, 89 L. Ed. 2d at ___. The Second Circuit has held that "when reasonable officers could disagree as to whether probable cause exists, the immunity defense is available." *Cartier v. Lussier,* 955 F.2d 841, 846 (2d Cir. 1992).

The question of immunity is distinct from the question of probable cause. Probable cause may be absent but immunity may still attach. *Magnotti v. Kuntz,* 918 F.2d 364 (2d Cir. 1990). Only where a police officer's belief concerning the presence of probable cause is patently unreasonable will he be denied qualified immunity. *Magnotti, supra,* 918 F.2d at 368.

The evidence introduced at trial clearly demonstrated that the police officers acted reasonably. It logically follows that if the doctrine of qualified immunity can shield a police officer from liability for an arrest without probable cause, then the doctrine should also shield a police officer from liability from not effecting an arrest where the police officer reasonably believes that there is no probable cause for an arrest.

V.

THE PETITIONER'S CLAIM ACCRUED WHEN SHE KNEW OR HAD REASON TO KNOW SHE WAS SUFFERING FROM A WRONG CAUSED BY THE RESPONDENT.

Petitioner alleged separate wrongful acts against each of the named police officers (J.A. 31) because of their alleged failure to act on specific threats and acts against the petitioner. Petitioner testified that she was not satisfied with police actions at the time they occurred and she expected an arrest at the time of each incident (J.A. 1122). The acts complained of against four defendant police officers occurred more than three years prior to the filing of the complaint on December 5, 1989.

There is no question that the statute of limitations for 42 U.S.C. §1983 actions in New York is three years. *Owens v. Okure*, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989).

The issue raised by the petitioner is at which point her claims accrued. The District Court dismissed the claims against the four officers finding that each officer's alleged failure to act was sufficient to enable the petitioner to know that she had suffered a compensable injury (A. 38a). The Second Circuit affirmed the dismissal of these claims by noting that the petitioner testified that she was beaten on November 23, 1986, and that her claims against the respondents for violating her rights to equal protection accrued at that time. *Eagleston, supra*, 41 F.3d at 872. Because the incidents involving the four police officers pre-dated November 23, 1986, the statute of limitations had expired. *Eagleston, supra*, 41 F.3d at 872.

This Court affirmed that the proper focus with regard to the accrual of a claim is "upon the time of the *discriminatory* acts, not

upon the time at which the consequences of the acts became most painful." *Delaware State College v. Ricks*, 449 U.S. 258, 101 S. Ct. 504, 66 L. Ed. 2d 431 (1980) *citing Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979). *See also, Chardon v. Fernandez*, 454 U.S. 6, 102 S. Ct. 28, L. Ed. 2d 6 (1981). Petitioner argues the opposite.

Because this issue was decided by the courts herein in accordance with the sound legal precedent established by this Court, it should not be revisited.

CONCLUSION

For all the foregoing reasons, petitioner's request for a writ of certiorari should be denied.

Dated: Hauppauge, New York
June 5, 1995

Respectfully submitted,

ROBERT J. CIMINO*
Suffolk County Attorney
JELTJE deJONG
Assistant County Attorney
Attorneys for Respondents
158 North County Complex
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Hauppauge, NY 11787-4311

* *Counsel of Record*

APPENDIX A — RELEVANT STATUTES

NEW YORK STATE CRIMINAL PROCEDURE LAW § 140.10(1)

§140.10 Arrest without a warrant; by police officer; when and where authorized

1. Subject to the provisions of subdivision two, a police officer may arrest a person for:

(a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and

(b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

* * *

NEW YORK STATE CRIMINAL PROCEDURE LAW § 10.00

§ 10.00 Definitions of terms of general use in this chapter.

Except where different meanings are expressly specified in subsequent provisions of this chapter, the following terms have the following meanings:

Appendix A

1. "Offense" means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same.

* * *

6. "Crime" means a misdemeanor or a felony.

NEW YORK STATE PENAL LAW § 240.25

§ 240.25 Harassment

A person is guilty of harassment when, with intent to harass, annoy or alarm another person:

1. He strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same; or

2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or

3. He follows a person in or about a public place or places; or

Appendix A

[4. Repealed]

5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

Harassment is a violation.

NEW YORK STATE FAMILY COURT ACT § 812

§ 812 Procedures for family offense proceedings.

1. Jurisdiction. The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree or an attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding. Fur purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this article, "members of the same family or household" shall mean the following:

(a) persons related by consanguinity or affinity;

(b) persons legally married to one another;

(c) persons formerly married to one another, and

(d) persons who have a child in common regardless whether such persons have been married or have lived together at any time.

2. Information to petitioner or complainant. The chief administrator of the courts shall designate the appropriate probation officers, warrant officers, sheriffs, police officers or any other law enforcement officials to inform any petitioner or complainant bringing a proceeding under this article, before such proceeding is commenced, of the procedures available for the institution of family offense proceedings, including but not limited to the following:

(a) That there is concurrent jurisdiction with respect to family offenses in both family court and the criminal courts.

* * *

Appendix A

(Identical provision is also set forth in New York State Criminal Procedure Law §530.11 "Procedures for Family Offense Matters.")

APPENDIX B — ORDER TO SHOW CAUSE DATED OCTOBER 23, 1986

At a Trial Term, Part 16, of the Supreme Court of the State of New York, in and for the County of Suffolk, held at the Courthouse thereof at Hauppauge, New York on the 23 day of Oct., 1986.

PRESENT:

HON. WILLIAM R. GEILER
JUSTICE

INDEX NO. 86-19952

CECELIA N. EAGLESTON.

Plaintiff,

-against-

THOMAS EAGLESTON,

Defendant,

ORDER TO SHOW CAUSE

UPON the annexed affidavit of CECELIA N. EAGLESTON, duly sworn to the 21st day of October, 1986, the affirmation of WILLIAM L. NETUSIL, ESQ., duly sworn to the 21st day of October, 1986, and upon all the papers and proceedings heretofore,

Appendix B

LET the defendant, THOMAS M. EAGLESTON, Show Cause before this Court at Motion Term to be held at Supreme Court, located at Veteran's Memorial Highway, Hauppauge, New York on Nov. 3rd, 1986 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made and entered herein,

(a) Granting the plaintiff and the infant Steven D. Eagleston an Order of Protection against the defendant directing him to refrain from any and all acts of violence directed towards the plaintiff and the said infant; directing the defendant to stay away from the place of residence of the plaintiff, her place of employment, and the school of the infant;

(b) Granting the plaintiff temporary use and occupancy of the marital residence;

(c) Granting the plaintiff exclusive use and possession of a 1974 Ford Mustang II automobile;

(d) Granting the plaintiff temporary exclusive possession of certain items of personal property;

(e) Granting the plaintiff sole custody of the infant Steven D. Eagleston, and restraining the defendant from removing said infant from the County of Suffolk;

(f) Directing that the Supreme Court retain exclusive jurisdiction over the instant matter;

* * *

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* Copy deleted by Hon William R. Geiler, J.S.C.

Appendix B

AND it appearing that this motion should be brought on in less time than would be required by Notice of Motion, let personal service of this Order and the papers upon which it is based upon the defendant, THOMAS J. EAGLESTON, on or before the 27th day of Oct., 1986 be deemed good and sufficient service.

AND, for good cause shown, pending the return date of this motion, let the defendant be ordered to refrain from any acts of violence towards the plaintiff or the infant Steven D. Eagleston, and let it be further

* * *

ORDERED, that the plaintiff have temporary exclusive use and possession of the 1974 Ford Mustang II, and have temporary exclusive possession of the items of property more fully set forth herein.

Dated: October 23, 1986

ENTER

s/ William R. Geiler
JUSTICE OF THE SUPREME COURT

APPENDIX C — ORDER OF PROTECTION DATED NOVEMBER 26, 1986

At a Trial Term, Part 17,
of the Supreme Court of the
State of New York, held in
and for the County of Suffolk,
at Hauppauge, New York on the
26 day of November, 1986.

PRESENT:

HONORABLE RALPH YACHNIN
Justice of the Supreme Court

Index No. 86-19952

CECELIA N. EAGLESTON.

Plaintiff,

-against-

THOMAS EAGLESTON,

Defendant,

ORDER

The plaintiff having initiated a contempt proceeding alleging the wilful violation by the defendant of an Order of an Order of this Court, and having been represented by WILLIAM L. NETUSIL, ESQ., and the defendant having been represented by the Suffolk County Legal Aid Society by: MICHAEL FUCHS, ESQ., and both parties having personally appeared before the

Appendix C

Honorable Ralph Yachnin on November 25, 1986, the parties having entered into a Stipulation which was orally presented on the record, it is hereby ORDERED;

1. That the contempt proceeding is hereby withdrawn by the plaintiff.

2. That the temporary order of protection contained within the Order to Show Cause signed by the Honorable William R. Geiler on October 23, 1986, requiring the defendant, THOMAS J. EAGLESTON, refrain from any acts of violence towards the plaintiff, CECELIA N. EAGLESTON, or the infant, STEVEN EAGLESTON, be continued until the return date of the aforesaid Order to Show Cause, to wit: DECEMBER 8, 1986, or such further adjourned date as the Court may grant.

3. Custody of STEVEN EAGLESTON, born September 28, 1978, is hereby awarded to the plaintiff, CECELIA N. EAGLESTON, until the return date of the Order to Show Cause, to wit: DECEMBER 8, 1986, or such further adjourned date as the Court may grant.

4. That the defendant, THOMAS J. EAGLESTON, shall refrain from having any contact with the infant, STEVEN EAGLESTON, until the aforesaid return date of the said Order to Show Cause.

5. That exclusive use and occupancy of the marital residence, located at 210 Irving Street, Central Islip, New York, is awarded to the plaintiff, CECELIA N. EAGLESTON.

Appendix C

ENTER

s/ RALPH YACHNIN
JUSTICE OF THE SUPREME COURT

[stamped]
GRANTED
NOV 26 1986
Juliette A. Kinsella
Clerk of Suffolk County

STATE OF NEW YORK)
) ss.:
COUNTY OF SUFFOLK)

I, JULIETTE A. KINSELLA, Clerk of the County of Suffolk and the Court of Record thereof, do hereby certify that I have compared the annexed with the original ORDER and, that the same is a true copy thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand this 26th day of November 1986.

s/ Juliette A. Kinsella (jk) Clerk
Juliette A. Kinsella